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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN C. WESTALL and PATRICIA)
WHEELER,)
)
Petitioners,) LUBA No. 96-254 and 96-255
)
vs.) FINAL OPINION
) AND ORDER
POLK COUNTY,)
)
Respondent.)

Appeal from Polk County.

John C. Westall and Patricia Wheeler, Monmouth,
represented themselves.

David Doyle, County Counsel, Dallas, represented
respondent.

LIVINGSTON, Referee; HANNA, Chief Referee; GUSTAFSON,
Referee, participated in the decision.

DISMISSED 02/26/97

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS
197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 In this consolidated appeal, petitioners appeal (1) the
4 county planning director's administrative preliminary
5 approval of a small-tract template dwelling in the Farm
6 Forest (FF) zone; and (2) the county's rejection of
7 petitioners' local appeal of the planning director's
8 decision on the ground that the appeal was untimely filed.

9 **MOTION TO DISMISS**

10 The county moves to dismiss this consolidated appeal on
11 the ground that petitioners failed to exhaust their
12 administrative remedies below by failing to file a timely
13 appeal of the planning director's decision to the board of
14 commissioners, as allowed by Polk County Zoning Ordinance
15 (PCZO) 122.270.¹

¹PCZO 122.270 provides:

- "(A) An appeal [of an administrative action of the planning director] may be taken to the Polk County Board of Commissioners by any person whose interests are affected adversely or who is aggrieved by action on an application under section 122.220. An appeal must be filed with the Community Development Department within 10 days after the mailing of notice to the applicant.
- "(B) On receiving an appeal the Department shall certify and deliver to the board a copy of the original application and copies of all other papers constituting the record on which the action appealed from was taken.
- "(C) Filing of an appeal stays all proceedings by all parties in connection with the matter appealed until the Board of Commissioners has made a decision on the appeal."

1 **A. Facts²**

2 On November 18, 1996, the planning director granted
3 preliminary approval of a small-tract template dwelling in
4 the FF zone. The preliminary approval describes the
5 procedure for filing a local appeal and states, "This
6 decision becomes effective only if a written appeal is not
7 filed within the appeal period. * * * **EFFECTIVE DATE:**
8 **November 29, 1996, at 5:00 p.m.**" (Emphasis in original.)
9 Record 27.

10 Petitioner Westall discussed the approval with staff in
11 the planning office on November 27, 1996, and obtained an
12 "Application to Appeal." He was told the deadline for
13 filing the local appeal was Friday, November 29, 1996, at
14 5:00 p.m., and the appeal fee was \$100.

15 The "Application to Appeal" itself states the fee for
16 appeals from planning director decisions is \$100. Record 9.
17 Nevertheless, when petitioner Westall called the planning
18 office at 3:00 p.m. on Friday, November 29, 1996 to ask
19 additional questions about the appeal, he was told by staff
20 that the fee had been increased to \$150. In his affidavit
21 he explains that he was unable to obtain the additional \$50

²The facts are not in dispute and are derived either from the record or from affidavits submitted by the parties. Evidence outside the record to support a claim of LUBA jurisdiction may be introduced through a motion for an evidentiary hearing under ORS 197.835(2)(b) and OAR 661-10-045 or, under certain circumstances, by attaching materials to the petition for review or other submissions. See Mazeski v. Wasco County, ___ Or LUBA ___ (LUBA No. 95-021, April 29, 1996), slip op 4-5.

1 before 5:00 p.m. and, therefore, did not file the
2 Application to Appeal and accompanying \$150 fee on that
3 Friday, November 29, 1996. Affidavit of John C. Westall 1.
4 At 5 p.m. on that Friday, the applicants for the small-tract
5 template dwelling specifically asked a secretary in the
6 planning division to write the date and time and to initial
7 their copy of the approval document. Affidavit of Roberta
8 Seeley 1.

9 On Monday, December 2, 1996, petitioners submitted
10 their Application to Appeal with the \$150 appeal fee. The
11 county rejected the appeal as untimely, and this appeal to
12 LUBA followed.

13 **B. Discussion**

14 This Board's jurisdiction is limited to those cases in
15 which the petitioner has exhausted all remedies available by
16 right before petitioning the Board for review.
17 ORS 197.825(2)(a). Lyke v. Lane County, 70 Or App 82, 85,
18 688 P2d 411 (1984). The county contends that "in this case,
19 petitioners were aware of the [appeal] deadline and simply
20 failed to file in a timely fashion." Memorandum in Support
21 of Motion to Dismiss 3.

22 Petitioners maintain that because they were not
23 notified of the increase in the local appeal fee until two
24 hours before the deadline for filing their appeal, they were
25 unable to file the Application for Appeal on time.
26 Petitioners contend that by stating a \$100 appeal fee on the

1 Application for Appeal itself and subsequently changing the
2 demanded appeal fee, the county so confused the appeals
3 procedure that they could not file a timely appeal.
4 Petitioners' argument, reduced to its simplest terms, is
5 that the county acted to make unavailable a local appeal
6 otherwise available by right.

7 Petitioners rely on Kunkel v. Washington County, 16 Or
8 LUBA 407, 415 (1988), in which we recognized that the
9 exhaustion requirement is triggered only when local
10 administrative remedies are available by right to a
11 petitioner. However, since there is no dispute that
12 petitioners had a right to a local appeal, our holding in
13 Kunkel is not helpful here.

14 As the parties seeking LUBA review, the burden is on
15 petitioners to establish our jurisdiction. Billington v.
16 Polk County, 299 Or 471, 475, 703 P2d 232 (1985); Bowen v.
17 City of Dunes City, 28 Or LUBA 324, 328 (1994). In this
18 case, that burden would have been satisfied if petitioners
19 had shown the county's actions precluded them from
20 exercising their right to a local appeal. However, even if
21 we assume the county's actions made it impossible for
22 petitioners to submit the Application for Appeal with a \$150
23 appeal fee before the local appeal period expired,
24 petitioners have neither contended nor demonstrated that the
25 county required concurrent payment of the full \$150 as a
26 prerequisite to accepting the Application for Appeal.

1 Petitioners have not established that the late announcement
2 of the increase in the appeal fee did in fact make a local
3 appeal unavailable to them. They have not shown they
4 exhausted their local administrative remedies.

5 This consolidated appeal is dismissed.